e Court, U. S.
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MICHAEL RODAK, JR., CLERK

80-832

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CARL E. MILLER, et al., as individuals, on behalf of themselves and all persons residing in the area of Avon Township subject to annexation; CYRIL M. PELICAN, et al., as individuals and on behalf of all persons residing in the portion of Avon Township not subject to annexation; EARL BORDEN, et al., as individuals and in the capacity of members of the Avon Township Board; Avon Township Individually and all persons residing in the portion of Avon Township not subject to annexaction,

Petitioners,

vs.

DAVID CALHOUN, et al., members of the STATE BOUNDARY COMMISSION AND JAMES S. HYDE,

Respondents,

and

CITY OF ROCHESTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PATTERSON & PATTERSON,
WHITFIELD, MANIKOFF,
TERNAN AND WHITE
By: Lawrence R. Ternan
Ten West Bloomfield Hills,
Michigan 48013
(313) 333-7941
Counsel for Petitioners

November 20, 1980

THE INLAND PRESS, DETROIT, MICHIGAN

QUESTIONS PRESENTED

1. Should this Court's summary disposition, for want of a substantial federal question, in *Midland Township* v. *State Boundary Commission*, 435 US 565 (1978), in which federal questions were not timely raised nor were they the basis of decision, be binding as precedent for this case in which properly raised substantial federal statutory and constitutional issues exist?

2. Whether the summary dismissal of Petitioner's suit was in error as the Michigan statute bases a vote on annexation matters on a suspect classification of more than 100 persons in the annexation area, and affidavits filed in this action attest to gerrymandering and discrimination by the Michigan Boundary Commission and cities to deny the right to vote in annexation matters by drawing lines to include 100 or fewer persons, which denies equal protection of the laws as guaranteed by the First and Fourteenth Amendment to the United States Constitution?

3. Whether the summary dismissal of Petitioner's suit was improper when there was a showing by affidavit of gerrymandering and discrimination by the Michigan Boundary Commission and cities to deny voters the right to vote in annexation matters, in violation of the Due Process Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment?

4. Whether the summary dismissal of Petitioner's suit was improper when there was a showing by affidavit of gerrymandering and discrimination in violation of the Voting Rights Act of 1965, 42 U.S.C. § 1971?

PARTIES TO PROCEEDING

CARL E. MILLER, EILEEN B. MILLER, ROY S. SALISBURY, JANET J. SALISBURY, CARL E. RICHARDSON, MARION E. RICHARDSON, LORRAINE HASSE, DAVID W. HASSE, JR., RICHARD R. SCHAUB, ANITA L. SCHAUB, LILLIAN McCRUDDEN, KEVIN McCRUDDEN, BRIAN McCRUDDEN, SCOTT McINNIS, ERLINDA McINNIS, JOSEPH L. FRANK, ARMOLDA R. FRANK, HENNY FRANK, ROBERT FRANK, ZELA FRANK, CHARLES YOURCHOK, JACK PULLIAM, VIRGINIA PULLIAM, BETTY N. REDDISH, MICHAEL REDDISH, GERALD B. AHRENS, RUTH E. AHRENS, as individuals, on behalf of themselves, and on behalf of all persons residing in the area of Avon Township subject to annexation,

CYRIL M. PELICAN, JACK L. STRIDDE, GEORGE HATFIELD, ALICE R. CANTARA, SANDRA HEISE, HAROLD C. GAUTHIER, RODNEY MUNCHIANDO, DANIEL BOWEN, IDA K. PARENT, JOSEPH R. CANTARA, DON A KEYLON, MICHAEL V. POST, ROBERT WICKERSHAM, as individuals, on behalf of themselves, and on behalf of all persons residing in the portion of Avon Township not subject to annexation,

EARL BORDEN, THELMA SPENCER, MILDRED KNUDSEN, EUGENE NOWICKI, MELVIN SCHMITTEL, DONALD HEALY, and GLADYS CORBIN, as individuals and in their representative capacities as members of the Avon Township Board, and AVON TOWNSHIP, a Michigan Municipal Corporation, on behalf of themselves, and on behalf of all persons residing in the portion of Avon Township not subject to annexation.

Petitioners,

DAVID CALHOUN, IRVING W. ROZIAN, JAMES SMITH, RAY LAHTI, JAMES SEETERLIN, as individuals and in their representative capacities as members of the State Boundary Commission, and JAMES S. HYDE, as am individual and in the capacity as Executive Secretary of the State Boundary Commission of the State of Michigan,

Respondents,

and

CITY OF ROCHESTER,

Respondent (by Intervention).

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Respondents,

and

CITY OF ROCHESTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the Order of the Sixth Circuit entered in this proceeding on August 26, 1980.

OPINION BELOW

The August 26, 1980, order of the Court of Appeals, unpublished, appears in the Appendix; the order contains a statement of reasons for its issuance. The Memorandum Opinion and Order of the District Court, unpublished, appears in the Appendix.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on August 26, 1980. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citiznes of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

MICHIGAN COMPILED LAWS:

§ 117.9 (4) and (5)

> (4) If an annexation is approved, and if on the date the petition or resolution was filed 100 persons or less

resided in the area approved for annexation, the commission's order shall not be subject to a referendum. The commission shall send a certified copy of its order to the clerk of each county, city, village and township affected and to the secretary of state. The annexation shall be effective on a date set forth in the commission's order.

(5) If an annexation is approved, and if on the date the petition or resolution was filed more than 100 persons resided in the area approved for annexation, the commission shall send a certified copy of its order to the clerk of each county, city, village and township affected and to the secretary of state. The commission's order shall become final 30 days after the date of the order unless within that 30 days a petition is filed with the commission which contains the signatures of at least 25% of the registered electors residing in the portion of the territory approved for annexation, in the annexing city or in the balance of the township. The commission after verifying the validity of any referendum petition shall order that a referendum on the question of annexation be held in each area from which a valid petition was filed. If a valid petition is not filed within 30 days or if the majority of the electorate voting on the question in each area in which a referendum was held, voting separately, approve the annexation, the annexation shall be effective on a date set by order of the commission, otherwise the annexation shall not take effect.

UNITED STATES CODE, TITLE 42:

§ 1971 (2), the pertinent part of the Voting Rights of 1965

(2) No person acting under color of law shall — (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

STATEMENT OF THE CASE

Petitioners, filed their Complaint in the United States District Court for the Eastern District of Michigan seeking relief from the denial of the right to vote by the Michigan State Boundary Commission.[1] On January 26, 1976, the Michigan State Boundary Commission, on the petition of the City of Rochester, Michigan, ordered the annexation of 2.2 square miles of the Charter Township of Avon. The Commission's annexation order has been stayed by the Michigan Courts.

Michigan law, MCL 117.9(4) and (5) permits a vote on annexation matters if there are more than 100 residents in the territory proposed to be annexed, but denies a vote if there are 100 or fewer residents. Petitioners claim actual gerrymandering and abuses, in fact, by the City of Rochester in drawing boundary lines for the area to be annexed, and by the Boundary Commission which promotes annexations with 100 or fewer residents, in order to avoid a vote.

The Defendants are the individual members and the Executive Secretary of the Michigan State Boundary Commission. The Boundary Commission, and the City of Rochester, which was allowed to intervene in the proceeding, filed Motions for Summary Judgment. In response, Petitioners filed a number of affidavits, uncontroverted by respondents, demonstrating the consistent and insidious policy and actions of cities and the Boundary Commission to deny votes in annexation matters.

The District Court determined the action should proceed as a class action with Petitioners representing all residents of townships in the State of Michigan, similarly situated.

The Boundary Commission filed a Motion for Accelerated Judgment, asserting as binding precedent this Court's summary disposition of an appeal from the Michigan Supreme

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[1]The Complaint was filed under 40 U.S.C. § 1983, and 42 U.S.C. § 1971. The jurisdiction of the Federal Court was founded on 28 U.S.C. § 1343 and the Federal Declaratory Act, 28 U.S.C. § 201-2.

Court, in *Midland Township* v. *State Boundary Commission*, 401 Mich 641 (1977), App. Dism. 435 US 1004 (1978). Petitioners contend a study of the records and briefs of the *Midland* case reveals the existence of dispositive non-federal issues, and tardy raising of federal issues, and that there are additional claims raised in this case: 1) a denial of due process of law and; 2) violation of the Federal Voting Rights Act.

The District Court granted the Motions for Summary Judgment, dismissing Petitioners Complaint. Because of that, the Court did not consider nor rule on the Motion for Accelerated Judgment, which involved this Court's summary dismissal of the *Midland* v. *Boundary Commission* case.

Since there was no ruling on the Motion regarding *Midland*, no appeal was taken by either party on that issue. In spite of that, the Court of Appeals disposed of the appeal by following this Court's summary disposition in the *Midland Township* case, as indicated in the last paragraph of the Court of Appeals Order.[2]

The affidavits filed in the District Court in opposition to the Motions for Summary Judgment include the following uncontested facts:

The City of Rochester-Avon Township annexation, which gave rise to this action, involves 2.2 square miles of Avon Township ordered to be annexed to the City of Rochester by the State Boundary Commission. The boundaries of the area are irregular and intentionally drawn to avoid people in order to avoid a vote.

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[2]It was contended in the Court of Appeals that before it should follow the summary disposition by this Court of the *Midland* case, the records and briefs in the *Midland* proceedings must be studied. Appellants in that case were principally townships, not voters, thus lacking standing to raise issues of denial of equal protection and voting rights. Further, the Michigan Supreme Court decided the *Midland* case on nonfederal grounds, and the federal questions were only raised, for the first time, on the Motion for Rehearing before the Michigan Supreme Court which was entirely untimely. (See Motion to Dismiss of the City of Novi Brief in the *Midland* case in the Appendix.) Also, violations of the Due Process Clause and the Voting Rights Act were not issues in the *Midland* proceeding.

The Rochester City Manager, Mr. Sinclair, stated in a letter to a resident in the area to be annexed:

> "The proposed area of annexation has less than 100 residents. It would be foolish to deny that this was not intentional."

In the affidavits, Dennis Gilliland, Professor of Statistics and Probability at Michigan State University sets forth his findings. In one table, Table IIB, he, for example, cites a city filing a number of petitions with the population under 100 in each instance. In 1978, through July 14, the same city had filed 45 separate annexation resolutions involving areas in Flint, Mt. Morris and Monday Township.

Other affidavits attest to multiple petitions for annexations of contiguous areas, with each petition containing less than 100 residents, including the following:

A. Five different petitions to annex parts of Mt. Morris Township, each area containing less than 100 residents.

B. The City of Monroe filed six separate petitions for annexation of parts of Frenchtown Charter Township.

C. The City of Monroe has annexed a number of parts of the Township and is presently attempting to annex an area with only 63 residents.

D. Annexation petitions of 12 separate parcels by the City of Flint. Each of the 12 parcels, except one, contains less than 100 residents.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND REOCCURRING PROBLEMS CONCERNING SUMMARY DISMISSALS OF APPEALS FROM STATE COURTS.

As indicated in the last paragraph of the Order, the Court of Appeals relied upon this Court's summary dismissal of the appeal from Michigan Supreme Court, for want of a substantial federal question, in the case of *Midland Township* v. *State Boundary Commission*, 435 US 1004 (1978). The District Court

specifically stated in its Opinion that it was making no findings nor ruling on the effect of this Court's summary disposition in the *Midland* case. It appears neither the Court of Appeals nor the District Court made any study of the records or briefs in the *Midland* case, as requested.

This suit was filed in the Federal Court in order to properly raise federal constitutional and statutory rights, and to have the federal issues decided by a Federal Court. The *Midland* case was presented to the Michigan Supreme Court by townships, not voters, as in this case. There were non-federal dispositive questions in *Midland*, and the federal issues were not timely raised, being raised only for the first time on rehearing before the Michigan Supreme Court.

The meaning of summary disposition is a significant and reoccurring problem. Just what does this Court's summary dismissal mean?

The Court of Appeals followed *Hicks* v. *Miranda*, 422 US 32 (1975). But *Hicks* contains an exception to its rule, if "doctrinal developments indicate otherwise." In *Mandel* v. *Bradley*, 432 US 173 (1977), this Court held the precedential effect of summary dispositions should not extend beyond "the precise issues presented and necessarily decided by those actions." Also, the case of *Ill. State Bd. of Elec.* v. *Socialist Workers*, 440 US 173 (1979), highlights the nature of a summary disposition, in that it may not be read to have an effect beyond what was essential to sustain the judgment.

At the very least, this Court should clarify that the *Midland* case is not precedent for this case, and remand this matter to the Court of Appeals for a ruling on the merits of the other issues involved. Or, this Court should remand this matter to the Court of Appeals for close scrutiny and findings of similarity ~~a ruling on the merits of the other~~ or dissimilarity with the *Midland* proceeding.

The dissimilarities between this action, and the facts and issues in the *Midland* proceeding are striking and include the following:

1. *Midland* involved different annexations, and different townships and cities. It was an action primarily of townships challenging the rulings of the Boundary Commission in the State Courts. It was eventually taken to the Michigan Supreme Court and then appealed to this Court. The federal issues were an after thought. This is a voter's rights action commenced in the Federal Court to secure federally protected rights.

2. No federally protected constitutional rights had been raised when the *Midland* case was first considered by the Michigan Supreme Court. Appellants, in the *Midland* appeal to this Court, at pages 21 and 22 of their Jurisdictional Statement, admitted that the decisions of the Trial Court and Michigan Court Appeals were only based upon state constitutional grounds. Nowhere in the Opinion of the Michigan Supreme Court is there any indication that the Equal Protection argument was considered and decided under the United States Constitution.

The first time the violation of the Equal Protection Provision of the United States Constitution was raised was in the Application for Rehearing before the Michigan Supreme Court. On December 16, 1977, the Michigan Supreme Court denied the Application for Rehearing without further comment, obviously not deciding the federal questions only then raised for the first time.

The City of Novi, in the *Midland* case, filed a Motion to Dismiss[3] contending the Michigan Court decided *Midland* on non-federal issues, and the federal issues were not timely raised.

This Court has consistently held that it is without jurisdiction where the federal questions was raised for the first time in a Petition for Rehearing in the highest Court of a State and the rehearing was determined without expressed determination of

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[3]The Motion to Dismiss is included in the Appendix.

the federal question. *McMillen* v. *Ferrum Mining Co.*, 197 US 343 (1904); *Herndon* v. *State of Georgia*, 293 US 441 (1935).

3. This Court has consistently held that the basis of jurisdiction must be clear and unmistakable, and that where there are similar provisions in the State or Federal Constitution, it is presumed that reliance is placed upon the State Constitution, unless reliance upon the Federal Constitution is specifically enumerated. *Bowe* v. *Scott*, 233 US 658 (1913), *Gibbes* v. *Zimmerman*, 290 US 326 (1933).

The Michigan Supreme Court did not at any point mention any Federal Constitutional provision or rights. Therefore, the decision of the Michigan Supreme Court must be presumed to have been on nonfederal grounds.

4. In this case, violations of the Federal Voting Rights Act, and violations of Petitioners' rights to due process of law as protected by the Federal Constitution are being raised. They were not raised in the *Midland* case. Neither the District Court nor the Court of Appeals gave attention to these new claims.

2. THE DECISION BELOW INVOLVES THE FUNDAMENTAL RIGHT TO VOTE, AND THE IMPORTANCE OF IT HAS NOT BEEN RECOGNIZED DUE TO AN ERRONEOUS FOLLOWING OF *HUNTER* v. *CITY OF PITTSBURGH*, WHICH DID NOT INVOLVE A CLAIM OF DENIAL OF EQUAL PROTECTION OR THE VOTING RIGHTS ACT.

The District Court abruptly ended this litigation without Petitioners having an opportunity to present any proofs. It is contended that the statute in question, on its face, violates the Equal Protection Clause of the Fourteenth Amendment. In addition, there are violations of equal protection in the application of that law by the individual members of the Boundary Commission. Petitioners also contend the actions of cities and the State Boundary Commission, are, in fact, denials of due process, and the Voting Rights Act.

A. THE RIGHT TO VOTE IS BEING DENIED IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The Michigan Supreme Court in *Midland* v. *State Boundary Commission*, 401 Mich 641 (1977), ruled Section 9 of the Home Rule Cities Act (MCL § 117.9) does not violate the right to equal protection (without citing any reference to the United States Constitution). It ruled, at page 679, *that the motive and purpose of drawing the boundary lines of an area for annexation is not material, even if boundary lines have been gerrymandered.*

Reliance was placed on *Hunter* v. *Pittsburgh*, 207 US 161 (1907), that a vote of the people is not necessary to annex. The Court recognized *Hunter* was decided before the advent of equal protection scrutiny upon the states, but it still followed *Hunter.*

In *Gomillion* v. *Lightfoot*, 364 US 339 (1967) this Court clearly limited the rights of states to act under the guise of *Hunter.*

The *Hunter* case held that people have no constitiutional right to a particular form of government. IT DID NOT HOLD THAT PEOPLE LOSE THEIR CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION AND DUE PROCESS BECAUSE OF THE UNIT OF GOVERNMENT IN WHICH THEY RESIDED.

The recent case of *Holt Civic Club* v. *City of Tuscaloosa*, 439 US 60 (1978), discusses the question of equal protection and voting rights. In the *Holt* case, this Court upheld an Alabama statute which provided that police jurisdiction shall cover adjoining territory within 3 miles of the corporate limits for the city. The Alabama statute on its face set up objective criteria which could not be manipulated by local or state officials, unlike the Michigan procedure which is manipulated by both cities and the State Boundary Commission.

In this case there is the claim boundary lines have been in-

vidiously drawn to avoid a vote. In *Holt* at pages 77-8, Justice Stevens, in a concurring opinion, observed:

> *Nor is there any claim that residency lines have generally been drawn invidiously or that residents of the police jurisdictions have been charged unreasonable costs for the services they receive.* (Emphasis added).

It is believed *Holt* would have been decided differently if the facts had been the same as they are in this case: lines purposefully drawn to avoid a vote.

The affidavits filed by Petitioners demonstrate, and the facts are, that cities and the State Boundary Commission, together, are using the loophole in the Home Rule Cities Act, *supra*, to deprive residents of townships the right to vote, which they would otherwise enjoy. When the City of Flint files seven different annexation petitions, the area involved in each petition containing less than 100 residents, on the same day, there are violations of constitutional rights. In the Flint case each of the petitions were for contiguous areas, which should have been contained in one petition. The Boundary Commission is "countenancing" these abuses, as the City of Rochester admitted in its Brief in the Court of Appeals.

Cities and the Boundary Commission are fashioning annexations without *any rational basis*. Even though both the Boundary Commission and the City of Rochester argue, the Classification may be justified in order to avoid a small number of people standing in the way of annexation, the practice has turned out to be that the "loophole" is a device to extend city boundaries in disregard to any "rational basis" and in disregard of equal protection and due process of the laws.

The District Court placed much emphasis upon the fact that annexation may occur constitutionally without a vote of the people, thereby citing a distinction with *Kramer* v. *Union Free School District*, 395 US 621 (1969). However, it is clear that a state might set up a system of appointing all school board members and it would not violate the Equal Protection Clause. Nevertheless, once a state begins to extend the franchise, the

compelling state interest test attaches to protect the franchise for all voters similarly situated.

This Court in *Kramer* v. *Union Free School District*, 395 US 621 (1969) recognized this fact when it stated at pages 628-29:

> The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment.

The District Court further found important that no election was scheduled to be held, as a distinction to the voting rights cases. If the method of discrimination is so sophisticated as to deny the right to vote by not providing an election for some residents in a community, while treating others differently, the right to equal protection of the law is not lost. *Cipriano* v. *Houma*, 395 US 701 (1969).

In the instant case, the hope is held out that those petitioning for an annexation will ask for an area containing more than 100 persons. However, this somehow never occurs. The areas to be annexed *always* contain less than 100 persons.

The right to vote is fundamental in a free democratic society. *Reynolds* v. *Sims*, 377 US 533 (1964); *Yick Wo* v. *Hopkins*, 118 US 356 (1886). This Court has zealously safeguarded the right to vote over a long period of time, and in a variety of different situations.

Statutes which deny some residents the right to vote in a special purpose election are not entitled to a general presumption of constitutionality. When the strict scrutiny test is applied, a statute which infringes upon a fundamental right such as voting will be upheld *only* if the state can demonstrate that it is necessary in order to satisfy a compelling state interest. *Kramer*, *supra*.

Going beyond the strict scrutiny test, the Michigan Statute does not have a "rational basis" either on its face or how it is being applied. The State may have been able to provide for no vote, but it may not tie a vote to something so arbitrary and

unrelated to a reasonable basis as a population figure of "100 or less."

Moreover, Petitioners have alleged in their Complaint, and Affidavits filed with the District Court show that MCLA 117.9 has not been used to promote the natural growth of cities, but to avoid votes. Petitions are being filed for several contiguous areas to avoid referendums. It is open and notorious. The Boundary Commission is not revising boundaries, thus avoiding a vote. The proofs would show cities are not growing on any reasonable basis . . . only on a basis of what they can grab in little chunks, or at least chunks without people.

In a Colorado case, the issue of voters' rights in annexation issues was raised. In *Adams* v. *City of Colorado Springs*, 308 F. Supp. 1397 (D. Col. 1970), the Court held:

> Greater or lesser continguity with a municipality is about the *only reasonable test* for the legislature to provide for unilateral annexation. *Adams, supra*, at 1404. (Emphasis added.)

The Michigan statute is either inscrutable as to its objectives, or at best, it is irrational. *The 100-person standard reaches the pinnacle of irrationality when it denies the franchise to a tiny, densely settled area, or to a large, sparsely settled area of 100 or less people, but grants the right of a referendum to areas of 100 or more people regardless of size and population density.*

Weber v. *City Council of Thousand Oaks*, 109 Ca. Rep. 553, 513 P.2d 601 (1973), has been heavily relied upon by respondents. But, *Weber*, presents different facts than in this case.

The California Legislature spelled out a compelling state interest in specific and detailed language in the legislation. The California Legislature, in amending its Act with a standard denying a vote if 12 or fewer registered voters reside in the area to be annexed gave the amendment "immediate effect as an urgency measure" in company with a formal legislative declaration of compelling necessity. The legislature declaration referred to the extreme shortage of housing, lack of land within

cities and the need for sewage, sanitation and utility services to justify the emergency nature of the act. The Michigan statute contains no counterpart of this legislative finding and declaration.

The *Weber* Court took pains to record the existence in California of sufficient judicial remedies and statutory inhibitions that are designed to frustrate rapacious and arbitrary annexations. See page 610, note 12. Those provisions protect against a species of domino downfall, several little nibbles, that is becoming favorite practice in Michigan.

Thompson v. *Whitley*, 344 F Supp 480 (E.D., N.C. 1972) has been cited for justification of the classification of the "loophole" provisions of Michigan's annexation statute. But, in *Thompson*, there was a very specific "Declaration of policy" included in the Act. (See pages 484-5). It is true it is not necessary to include a declaration of policy or purpose in a statute in order for it to be constitutional. But, if a classification or procedure set forth in a statute is suspect or involves a fundamental right, and it appears to have no rational basis, a declaration of purpose may explain it to protect it from being constitutionally invalid.

The *Thompson* holding may also be explained and distinguished by recognizing the areas not subject to a vote were in densely populated counties and it was the statutorily declared policy to encourage development of services in those areas. There was some rational basis for treating different areas differently then just on a population basis. The Court also recognized a right to vote to "de-annex" after being annexed without a vote. There is no such right in Michigan.

B. THE STATUTE AS APPLIED VIOLATES THE DUE PROCESS CLAUSE BY DENYING INDIVIDUAL CITIZENS THE RIGHT TO VOTE.

The proofs show that from January 1, 1978, until July 14, 1978, all matters, but one, coming before the Boundary Commission involved less than 100 people. (Affidavit, Dennis

Gilliland) The practical effect of the actions of the cities proposing the annexation, and the State Boundary Commission in granting such annexation, has been to deny the right to vote to all of the individuals involved. The operation and application of Section 9 of the Home Rule Act has been to deny due process to those residents of townships annexed since 1970.

In *Bodie* v. *Connecticut*, 401 US 371 (1971) this Court held that the denial by the State of Connecticut of divorces to indigents because of failure to pay filing fees and service fees denied due process. If marriage involves an interest of basic importance in our society, clearly the right to vote is equally important. The right to vote has been made meaningless because of the actions of the cities and the State Boundary Commission.

Due process in the final analysis involves questions of fundamental fairness. The Michigan statute as applied in practice has the defect that the criterion on whether an individual receives the right to vote is floating and is dependenent on those persons who by definition have interests adverse to the disenfranchised voter. Justice Stevens in *Holt, supra*, recognized that in upholding that statute there was no allegation that it was applied unfairly.

However, the claim of unfair treatment and invidious discrimination is precisely what Petitioners in this case are raising under the reasoning of *Holt*. The provisions of the Michigan Statute in question as applied in practice violates the due process clause of the 5th Amendment as applied to the states through the 14th Amendment.

C. MCL § 117.9 VIOLATES THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. §1971, AND NEITHER OF THE LOWER COURTS CONSIDERED IT.

Petitioners contend that Subsection (2) of Section 1971, the Voting Rights Act, is not limited to racial standards but applies to any form of discrimination. In support of this position *Frazier* v. *Callicut*, 383 F. Supp 15 (N.D. Miss, 1974), is cited, a

consolidated cause of action concerning the treatment accorded registration applicants by a registrar of elections in Mississippi.

The Court, in considering the applicability of 42 USC § 1971 said:

> A plain reading of the statute discloses no limitations which would preclude its application to cases of non-racial discrimination as well as racial; however, at least one district court judge in this circuit has found judicial construction, this portion of the Civil Rights Act of 1964 proscribes the use of different standards in voting registration procedures only when racial consideration dictate the standard to be employed. *Ballas* v. *Symm*, 351 F. Supp. 876, 888-889 (S.D. Tex. 1972), aff'd 494 F2d 1167 (5th Cir. 1974). 383 F Supp 15, 20.
>
> . . . (T)he tenor of the circuit court's opinion in Ballas persuades this court that, in a proper case, 42 U.S.C. § 1971 (a)(2)(a) may be applied to prohibit discrimination on non-racial as well as racial grounds. 383 F Supp 15, 20.

Subsection (2) provides that to determine qualifications to vote, no standard, practice or procedure may be applied differently to persons within the same county, parish or political subdivision. MCLA 117.9 treats voters in an annexed area different by depending on whether less or more than 100 resients live in the affected area in violation of Subsection (2), *supra*.

In *Shivelhood* v. *Davis*, 366 F Supp 11 (D.Vt., 1971) the Court applied the Voting Rights Act to student voting restrictions which involve no aspect of racial discrimination. Moreover, resort to legislative intent should not be utilized when the clear meaning of the language is apparent on its face. *Chandler* v. *Roudebush*, 425 US 840 (1976).

The clear language of §1971 (a)(2)(A) states that no person acting under color of law shall use different standards for different individuals without violating the law. The plain meaning of this language is clear on its face and no resort to legislative history is necessary.

CONCLUSION

For these reasons, a writ of certiori should issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
PATTERSON & PATTERSON,
WHITFIELD, MANIKOFF,
TERNAN AND WHITE
By: Lawrence R. Ternan
Ten West Square Lake Road
Bloomfield Hills, Michigan 48013
(313) 333-7941
Counsel for Petitioners

November 20, 1980

APPENDIX
IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. .....

CARL E. MILLER, et al., Petitioners,
vs.
DAVID CALHOUN, et al., Respondents,
and
THE CITY OF ROCHESTER, Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 78-1545

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL E. MILLER, et al., as individuals, on behalf of themselves and all persons residing in the area of Avon Township subject to annexation; CYRIL M. PELICAN, et al., as individuals and on behalf of all persons residing in the portion of Avon Township not subject to annexation; EARL BORDEN, et al., as individuals and in the capacity of members of the Avon Township Board; Avon Township Individually and all persons residing in the portion of Avon Township not subject to annexation.

Plaintiffs-Appellants,

v.

DAVID CALHOUN, et al., members of the STATE BOUNDARY COMMISSION and JAMES S. HYDE,

Defendants-Appellees,

and CITY OF ROCHESTER,

Intervening Defendant-Appellee.

ORDER

(Filed August 26, 1980)

Before: EDWARDS, Chief Judge; WEICK and MARTIN, Circuit Judges.

Plaintiffs appeal the judgment of the District Court dismissing their complaint by way of summary judgment. The action was brought for alleged violations of the equal protection clause, the due process clause, and the Voting Rights Act of 1965, 42 U.S.C. § 1971, due to a denial of voting on annexation of Avon Township by the City of Rochester. The action proceeded as a class action, with plaintiffs representing all township residents and the townships in the State of Michigan. The defendants are the Executive Secretary and individual members of the Michigan State Boundary Commission. The City of Rochester was granted the right to intervene as the annexing city.

The statute in question is Section 9 of Michigan's Home Rule Cities Act, Mich. Comp. Laws Ann. § 117.1 *et seq.* Section 117.9 permits annexation of areas with 100 or few residents without a referendum. For those areas containing more than 100 residents, a referendum is required. The Rochester-Avon annexation includes 2.2 square miles of Avon ordered to be annexed by the State Boundary Commission. Appellants contend that the boundary lines are irregularly drawn in order to avoid a referendum; that permitting some residents to vote on annexation and denying that right to others involves the issue of the fundamental right to vote; and that Michigan provides no remedy or protection against invidious manipulation of this particular annexation statute. Appellants claim that the present application of the statute works to disenfranchise the voter, as the lines are consistently drawn to annex areas with less than 100 persons.

The Michigan Supreme Court has addressed those same constitutional arguments in *Midland Township* v. *State Boundary Commission*, 401 Mich. 641, 259 N.W.2d 326 (1977). Appellants in *Midland Township* challenged the constitutionality of Section 117.9. The court described the nature of annexation proceedings as follows:

> No city, village, township or person has any vested right or legally protected interest in the boundaries of such governmental units. The Legislature is free to change city, village and township boundaries at will. This was settled for Federal Constitutional purposes in *Hunter* v. *Pittsburgh*, 207 US 161, 178-179; 28 S Ct 40; 50 L Ed 151 (1907), and the principles there established have been observed in subsequent litigation in the courts of this and other states. (citations omitted.)

Midland Township, supra at 664-665.

The court went on to address possible infringement of equal protection rights under Michigan law or Fourteenth Amendment violations under the United States Constitution:

> We are of the opinion that the challenged classification bears a substantial relation to the object of the legislation: providing a means appropriate to the resolution of disagreements concerning annexation of territory to a city.
>
> Some territory annexed will be sparsely populated or unpopulated while other territory will be more heavily populated. The challenged classification, responsive to that factual difference, tends to prevent venal abuses which there is reason to believe may occur if few persons (or a small group of persons) have absolute power to prevent an annexation economically advantageous to other persons or the community at large. See *Weber* v. *Thousand Oaks City Council*, 9 Cal 3d 950; 109 Cal Rptr 553; 513 P2d 601 (1973), sustaining against an equal protection challenge a classification providing for a referendum if the area has more than 12 resident registered voters but dispensing with a referendum where there are fewer voters. It was not violative of the Equal Protection Clause to draw a line, and the line drawn (at 100) was not unreasonable.

Midland Township, supra at 666-667.

Appellants now contend that *Midland Township* and the District Court misapplied and misconstrued *Hunter, supra,* and that *Weber* is no authority to support Michigan's "100 or fewer" classification as a compelling state interest or as based on a rational purpose. They argue that violations of federal constitutional rights have been alleged and should be decided by a federal court. Following the *Midland Township* decision, a jurisdictional statement was filed in the United State Supreme Court raising the equal protection argument. The Supreme Court dismissed the appeal for want of a substantial federal question. *Midland Township* v. *State Boundary Commission*, 435 U.S. 1004, 98 S. Ct. 1873, 56 L. Ed. 2d 386 (1978). It is

thus clear that the District Court's determination that no substantial federal question existed is correct. The judgment is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL E. MILLER, et al.,
Plaintiffs,

v.

DAVID CALHOUN, et al.,
Defendants,

Civil Action
No. 8-70333

and

CITY OF ROCHESTER,
Intervening Defendant.

MEMORANDUM OPINION AND ORDER

The plaintiffs in this class action are township residents and townships who feel that the current Michigan system under which a city can annex part of a township without a vote denies them certain federal rights. The main statute involved is M.C.L.A. 117.9, which permits the annexation of areas with one hundred or fewer residents without a referendum while requiring such a referendum when the area to be annexed contains more than a hundred residents.

The plaintiffs' claims are brought to this court under 42 U.S.C. § 1983 and 42 U.S.C. § 1971, but they are based on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The argument made is that persons living in areas annexed containing fewer than one hundred persons are denied the protection given to persons living in areas

annexed which contain at least one hundred others. This line drawn at one hundred is the focus of the plaintiffs' attention in this court.

First, it must be emphasized that what the state has done in this case is to provide a system for the annexation of property. The Supreme Court has since 1907 made it clear that states are not limited in the way they may adjust the boundaries of the various units of government within a state.

In *Hunter* v. *Pittsburgh*, 207 U.S. 161 (1907), the United States Supreme Court allowed the State of Pennsylvania to consolidate two cities without the direct approval of the residents of those cities, and it announced the breadth of state power in determining the existence and makeup of its municipalities. The court noted that municipalities are created by and for the convenience of the state. This being the case, the state may act with broad discretion in dealing with them. It may permit boundary changes with or without the consent of those living in the area.

Plaintiffs point out that *Hunter* was decided before the advent of equal protection scrutiny upon the states. Since this is true, it is necessary for this court to decide whether the system as it exists in Michigan conflicts with this important federal guarantee. This is not a case like *Kramer* v. *Union School District No. 15*, 395 U.S. 621 (1969), or *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), where it had been determined that an election would take place, and the only question remaining was whether or not certain individuals would participate in that election. This is a case where the court has already determined that voting is not essential to state actions to annex property.

Plaintiffs claim that denial of the right to vote is a denial of a fundamental right but as *Hunter* clearly held, this is an area where there is no inherent or fundamental right to vote. It is hard for this court to see how something that can be taken away at will may be classified as fundamental.

Since there is no fundamental right involved, and since the

area of discussion is one which goes to the heart of the operation of the state, this court need only find that there is a rational basis for the system in order to uphold it. This court finds that the state may have decided that it did not want to permit small groups of people to be able to stand in the way of the natural growth of cities. This is a sufficiently rational basis to "pass muster" under the applicable equal protection test.

There appears to be more involved in this suit, however. Plaintiffs are obviously and admittedly interested in retaining the township form of local government. They realize the power of the state to abolish townships entirely, so they look elsewhere for support. They make much of the fact that cities using the existing system to their own best advantage have been purposely annexing small areas to avoid referenda. The state has adopted legislation to encourage annexation of areas having a small population as a method of providing for orderly development. It is not for this court to get involved.

The interest of this court is to assure that the state does not treat similarly situated persons differently without a rational basis.

Underlying a contorted effort to make a voting rights case out of an annexation case is a complaint that the Michigan State Boundary Commission is not doing its job properly. That body is charged with examining each proposed annexation, whether having fewer than 100 persons living in the area or more, to determine whether it is a reasonable area to be annexed in light of all of the standard considerations that go into annexation decisions. If the commission is not considering all of the factors outlined in the statutes establishing the duties of the commission, the proper forum for complaint is the state court.

Prior litigation involving the very annexation originally involved in this action upheld the validity of the statute involved in this case and the action of the Boundary Commission. *Midland Township* v. *State Boundary Commission*, 401 Mich. 641,

259 N.W. 2d 326 (1977), *appeal dismissed*, 46 U.S.L.W. 3679 (May 1, 1978).

No federal question is presented by the allegedly improper actions of the commission. For the reasons given in this opinion, the defendants' motion for summary judgment is granted. Because of this ruling, this court need not consider the motions framed as motions for accelerated judgment.

So ordered.

/s/ Charles W. Joiner
CHARLES W. JOINER
United States District Judge

Dated: September 8, 1978
Detroit, Michigan

No. 77-1285
IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1977

TOWNSHIP OF MIDLAND, et al,
Appellants,

vs.

MICHIGAN STATE BOUNDARY COMMISSION, et al,
Appellees,

On Appeal From the Supreme Court of Michigan

MOTION TO DISMISS OR AFFIRM

City of Novi, intervening Defendant-Appellee, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Michigan on the following grounds:

1. The Federal question sought to be reviewed was neither timely nor properly raised nor expressly passed on by the Supreme Court of Michigan.

2. The appeal does not present a substantial Federal question.

JAN 12 1981

No. 80-832

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CARL E. MILLER, et al., as individuals, on behalf of themselves and all persons residing in the area of Avon Township subject to annexation; CYRIL M. PELICAN, et al., as individuals and on behalf of all persons residing in the portion of Avon Township not subject to annexation; EARL BORDEN, et al., as individuals and in the capacity of members of the Avon Township Board; Avon Township Individually and all persons residing in the portion of Avon Township not subject to annexation,

Petitioners,

vs.

DAVID CALHOUN, et al., members of the STATE BOUNDARY COMMISSION AND JAMES S. HYDE,

Respondents,

and

CITY OF ROCHESTER,

Respondent.

BRIEF OF RESPONDENTS DAVID CALHOUN, ET AL, MEMBERS OF THE STATE BOUNDARY COMMISSION, AND JAMES S. HYDE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Milton I. Firestone
Christopher J. Dembowski
Assistant Attorneys General

401 S. Washington Square
Plaza One Bldg., Ste. 3
Lansing, Michigan 48933
(517) 373-9100

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QUESTIONS PRESENTED

For the purpose of clarity, Respondents restate the questions presented by Petitioners as follows:

1. Does a statutory provision which permits residents of an area proposed to be annexed by a city to petition for a referendum vote on the annexation question when more than 100 people reside in such area but does not permit individuals to petition for a referendum on the annexation if 100 or fewer residents reside in the area proposed to be annexed violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does a statutory provision which permits residents of an area proposed to be annexed by a city to petition for a referendum vote on the annexation question when more than 100 people reside in such area but does not permit individuals to petition for a referendum on the annexation if 100 or fewer residents reside in the area proposed to be annexed violate the Due Process Clause of the Fifth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment to the United States Constitution?

3. Does a statutory provision which permits residents of an area proposed to be annexed by a city to petition for a referendum vote on the annexation question when more than 100 people reside in such area but does not permit individuals to petition for a referendum on the annexation if 100 or fewer residents reside in the area proposed to be annexed violate the Voting Rights Act of 1965, 42 USC § 1971 *et seq*?

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No. 80-832

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CARL E. MILLER, et al., as individuals, on behalf of themselves and all persons residing in the area of Avon Township subject to annexation; CYRIL M. PELICAN, et al., as individuals and on behalf of all persons residing in the portion of Avon Township not subject to annexation; EARL BORDEN, et al., as individuals and in the capacity of members of the Avon Township Board; Avon Township Individually and all persons residing in the portion of Avon Township not subject to annexation,

Petitioners,

vs.

DAVID CALHOUN, et al., members of the STATE BOUNDARY COMMISSION AND JAMES S. HYDE,

Respondents,

and

CITY OF ROCHESTER,

Respondent.

BRIEF OF RESPONDENTS DAVID CALHOUN, ET AL, MEMBERS OF THE STATE BOUNDARY COMMISSION, AND JAMES S. HYDE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents David Calhoun, et al, members of the State Boundary Commission, and James S. Hyde respectfully show why the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied in the above-entitled cause.

STATEMENT OF THE CASE

Respondents do not accept the argumentative conclusions set forth in the Statement of the Case made by Petitioners. Respondents accept the Statement of the Case made by Petitioners as an accurate representation of the procedural aspects of this case and as an accurate representation of the allegations made in the Complaint upon which the District Court granted Summary Judgment.

The Statement of the Case should also indicate that the stay of the annexation by the Michigan courts referred to at page 4 of Petitioners' Brief has now been dissolved. The Stay Order which prevented this annexation from taking effect was dissolved by a decision of the Michigan Court of Appeals in *Avon Township* v *State Boundary Commission*, 96 Mich App 736; 293 NW2d 691 (1980), *leave den.* —— Mich —— (November 25, 1980), and the annexation became effective when the application for leave to appeal filed by the Township of Avon with several of the individual petitioners in this case was denied on November 25, 1980, by the Michigan Supreme Court.

In discussing the timeliness in which certain federal questions were raised before this Court and the Michigan Supreme Court in *Midland Township* v *State Boundary Commission*, 401 Mich 641; 259 NW2d 326 (1977), *appeal dismissed*, 435 US 1004 (1978), at page 5 of Petitioners' Brief, it should be noted that the State Boundary Commission admitted that the federal equal protection question was raised both before the Michigan circuit court and the Michigan Supreme Court. (See the description of Proceedings Below set forth in the Motion to Dismiss or Affirm by the State Boundary Commission in the *Midland* case in the appendix to this Brief.)

ARGUMENT

I.

SECTION 9 OF THE MICHIGAN HOME RULE CITIES ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The legality of section 9 of the Michigan home rule cities act, 1909 PA 279, as amended; MCLA 117.9; MSA 5.2079, has previously been considered by this Court. Following the Michigan Supreme Court's decision in *Midland Township* v *State Boundary Commission,* 401 Mich 641; 259 NW2d 326 (1977), the townships and individuals involved in that case filed a Jurisdictional Statement with this Court raising the issue of whether section 9 of the Michigan home rule cities act, *supra,* violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. On May 1, 1978, this Court entered an order dismissing the appeal for want of a substantial federal question. *Midland Township* v *State Boundary Commission,* 435 US 1004 (1978).

In *Hicks* v *Miranda,* 422 US 332 (1975) this Court stated that a summary decision by this Court without opinion for want of a substantial federal question is a decision on the merits of the case. Accordingly, this Court's decision in *Midland Township* v *State Boundary Commission, supra,* that a substantial federal question was not presented when it was alleged that Michigan's home rule cities act violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, establishes a precedent to be followed in this case.

Petitioners assert that the *Midland* case is distinguishable from this case in that the *Midland* case was brought by town-

ships and not by voters. A review of the Briefs filed with this Court in the *Midland* case indicates that the Appellants therein consisted of both townships and individuals. Similarly, in this case, we have a township joining with individuals as Petitioners. The *Midland* case cannot be distinguished on the basis that the parties involved there had different interests or concerns than the parties in this case. The townships and the individuals involved in the *Midland* case raised the very same equal protection challenge under the Fourteenth Amendment to the United States Constitution as Petitioners are raising.

Petitioners also contend that this Court's decision in the Midland case is distinguishable for the reason that the alleged violation of the equal protection provision of the United States Constitution was not timely raised, and accordingly, not considered by this Court. Petitioners properly note that in the *Midland* appeal to this Court, at pages 21 and 22 of the Jurisdictional Statement, Appellants therein admitted that the decisions of the trial court and the Michigan Court of Appeals were based upon state constitutional grounds. However, what Petitioners failed to state in their brief is that the Jurisdictional Statement filed with this Court in the *Midland* appeal went on to disclose that the Michigan Supreme Court reversed the decision of the trial court and the Michigan Court of Appeals, and found that section 9 of the Michigan home rule cities act, *supra*, did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In the Motion to Dismiss or Affirm filed by the State Boundary Commission in the *Midland* case, it is admitted in the description of the Proceedings Below that the decision of the Michigan Supreme Court in *Midland* was based upon a finding by the Court that there had been no violation of the equal protection guarantees afforded by the Fourteenth Amendment to the United States Constitution. (See the description of Proceedings Below set forth in the Motion to

Dismiss or Affirm by the State Boundary Commission in the *Midland* case in the Appendix to this Brief). Since both the *Midland* case and this case involve alleged violations of rights secured by the Equal Protection Clause of the United States Constitution, the two cases cannot be distinguished on this basis.

Petitioners further attempt to distinguish this Court's holding in the *Midland* case by stating that it is not clear whether the Michigan Supreme Court made its decision based upon the state constitution or on the federal constitution and that unless reliance upon the federal constitution is specifically enumerated, it must be presumed that the Michigan Supreme Court based it decision on nonfederal grounds. The Michigan Supreme Court has long held that the state constitution secures the same rights of equal protection as does its counterpart in the Constitution of the United States. *Fox* v *Unemployment Security Commission*, 379 Mich 579; 153 NW2d 644 (1967). In holding that section 9 of the Michigan home rule cities act, *supra*, was not a violation of equal protection, in light of challenges to that provision of state law pursuant to both the state and the United States Constitutions, it is clear that the Michigan Supreme Court concluded that no violation of the Fourteenth Amendment of the United States Constitution existed.

Regardless of the precedential effect of this Court's decision in the *Midland* case, it is clear from other precedent that no substantial federal question has been raised in this case. This Court, in *Hunter* v *Pittsburgh*, 207 US 161 (1907), set forth the broad powers conferred upon a state to adjust municipal boundaries within such a state. In discussing the adjustment of municipal boundaries, this Court has previously found that a state is supreme in all such respects, and its legislative body, in conforming its actions to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the

United States. *Hunter* v *Pittsburgh,* Id. at 178. The Michigan Supreme Court relied upon this very language in reaching its decision in the *Midland* case. *Midland Township* v *State Boundary Commission,* 401 Mich 641, 665-666; 259 NW2d 326, 338.

Appellants argue that the *Hunter* case was misapplied by the Michigan Supreme Court is deciding *Midland* and argue that *Hunter* is inapplicable to an alleged violation of equal protection pursuant to the United States Constitution. The continued viability of the *Hunter* decision was noted by this Court in *Holt Civic Club* v *Tuscaloosa,* 439 US 60, 71 (1978), where this Court stated that while somewhat qualified, *Hunter* v *Pittsburgh* "continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority in them."

The control of the City of Tuscaloosa over residents of territory adjoining the city without granting the right to vote in *Holt Civic Club* is substantially greater than the control over the residents of townships afforded Michigan cities as a result of section 9 of the Michigan home rule cities act, *supra.* Under the statute before this Court in *Holt Civic Club,* an Alabama city can exercise continuing police power ad infinitem over property adjoining the city without affording the individuals of such territory the right to vote. The City of Tuscaloosa can make numerous decisions under this statute with respect to municipal ordinances, the licensing of businesses, and other matters, all of which affect individuals living outside the city on a daily basis without being required to allow these non-city residents to participate in the decision making process. Yet, this Court did not think that such a situation was sufficient to establish a constitutionally protected right to vote in the residents of the territory adjoining the City of Tuscaloosa.

As in *Holt Civic Club,* Plaintiffs in this case have failed to

show initially that a right to vote exists. Additionally, it should be noted in the present case that those individuals whose property has been annexed by the City of Rochester now enjoy the same voter rights as other residents of the City of Rochester. Thus, unlike the situation in *Holt Civic Club*, ongoing control by a city over adjoining territory is not granted under the Michigan home rule cities act without giving residents of the affected area the right to vote. While no right to vote on the initial question of whether the annexation should take place exists, those whose property is annexed without a vote are in a substantially better position to have a voice in the government they are regulated by than are Alabama residents living outside of major cities in Alabama.

Similar arguments to those raised by Petitioners in this case were raised before the Sixth Circuit Court of Appeals in the case of *Detroit Edison Co* v *East China Township School District No. 3*, 378 F2d 225 (CA 6, 1967), *cert den* 389 US 932 (1967). The Court, in the *Detroit Edison Co, Id.*, 378 F2d at 229, noted that reliance by Plaintiffs therein upon reapportionment cases such as *Gomillion* v *Lightfoot*, 364 US 339 (1960) was misplaced and that such cases create no constitutional rights in affected citizens concerning the procedure for creating or altering any type of state districts. The Court went on to find that equal protection and due process challenges to the annexation question in that case were without merit. Cases from other circuits to the same effect include *Hammonds* v *City of Corpus Christi*, 343 F2d 162 (CA 5, 1964) *cert den* 382 US 837 (1965), and *International Harvestor Co* v *Kansas City*, 308 F2d 35 (CA 10, 1962), *cert den* 371 US 948 (1963).

The California Supreme Court considered a similar contention to that presented here in *Weber* v *City Council of Thousand Oaks*, 109 Cal Rptr 553; 513 P2d 601 (1973). The Court in *Weber* found that no violation of equal protection

was involved since a rational basis existed for allowing the annexation of an area with less than twelve registered voters without allowing those individuals a right to vote on the annexation, even though areas with more than twelve registered voters were, by statute, given the right to vote on annexations.

The classification considered by the Court in *Weber* differs from that contained in section 9 of the Michigan home rule cities act only in the measure which is used to determine if a referendum should be held. California looks to resident registered voters in the area proposed to be annexed while Michigan looks to the total population of such area. In California, it is possible under the statute considered in *Weber* for an annexation to be allowed without a vote even though more than 100 people reside in the area proposed to be annexed. This would occur if fewer than twelve of such residents were registered voters. In Michigan, the right to petition for a referendum on the annexation exists whenever over 100 people reside in the area proposed to be annexed.

Petitioners attempt to distinguish *Weber* by arguing that a compelling state interest existed for the statutory distinction which existed in that case. However, the fact remains that the California Supreme Court did not look for the existence of a compelling state interest in upholding the legislation which was challenged in *Weber*. The Court in *Weber* required only the existence of a rational basis to uphold the classification set forth in the California statute; and in looking for the existence of a rational basis the California Supreme Court noted that such a statutory classification should only be set aside if no grounds can be conceived which justify such a classification. *Weber, supra,* 513 P2d at 608.

Equal protection challenges to annexation procedures in other states have traditionally been reviewed to determine the existence of a rational basis for a classification which allows

one group to vote on an annexation question but denies that right to another group. *City of Monticello* v *Adams*, 200 NW2d 522 (Iowa, 1972); *Adams* v *City of Colorado Springs*, 308 F Supp 1397 (D.C. Col. 1970), aff'd 399 US 901 (1970); *Thompson* v *Whitley*, 344 F Supp 480 (E.D. N.C. 1972). In each of these cases, a rational basis was found to exist.

Similarly, a rational basis exists for the classification contained in section 9 of the Michigan home rule cities act, *supra*. The Michigan Supreme Court found that such a rational basis existed when it stated as follows:

> "Some territory annexed will be sparsely populated or unpopulated while other territory will be more heavily populated. The challenged classification, responsive to that factual difference, tends to prevent venal abuses which there is reason to believe may occur if few persons (or a small group of persons) have absolute power to prevent an annexation economically advantageous to other persons or the community at large . . . ." *Midland Township* v *State Boundary Commission*, 401 Mich at 667; 259 NW2d at 339.

In the instant case, both the District Court and the Court of Appeals have concurred with this finding by the Michigan Supreme Court.

II.

SECTION 9 OF THE MICHIGAN HOME RULE CITIES ACT, AS APPLIED BY THE STATE BOUNDARY COMMISSION, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

Petitioners argue that they have been denied due process as guaranteed by the United States Constitution through the application of section 9 of the Michigan home rule cities act by the State Boundary Commission. To support this contention, Petitioners rely upon *Bodie* v *Connecticut*, 401 US 371 (1971), which struck down a Connecticut statute requiring all individuals, including indigents, to pay on the average a $60 fee for filing and service of process before an individual could seek a divorce under Connecticut law. This Court, in striking down the Connecticut statute, did so on the basis that no other available means of obtaining a divorce existed in Connecticut and that to require the payment of such fees resulted in the denial of an opportunity to be heard to those indigents who wished to obtain a divorce. Underlying this Court's decision in *Bodie* is the finding that a right exists which should be protected. The instant case is distinguishable from *Bodie* in that Petitioners have failed to establish that a right has been interferred with.

Petitioners' conclusion that the State Boundary Commission is acting to deny the right of people to vote on annexations is not logically supported by the premises of their argument. The point at which the right to vote on an annexation is triggered is statutorily set by section 9 of the Michigan home rule cities act. There is no discretion vested in the State Boundary Commission over whether an election should be provided for. If over 100 people reside in the area proposed to be annexed,

they have the right to petition for a referendum on the annexation question. The State Boundary Commission is without power or authority to order an annexation referendum under any other circumstances.

The affidavit of Dennis Gilliland, which was presented by Petitioners to the District Court in this case, shows that all annexation matters coming before the State Boundary Commission from January 1, 1978, until July 14, 1978, were initiated either by petitions filed by individuals or by resolutions of cities proposing annexations. In no instance was an annexation matter initiated by the State Boundary Commission since the Commission lacks the power to initiate an annexation proceeding. The fact that the vast majority of petitions filed with the State Boundary Commission involved areas with less than 100 citizens is not a matter within the control of the Commission.

The State Boundary Commission is required by statute to process all petitions and resolutions in the order in which they are filed and to finally dispose of a petition or resolution before taking up any other petitions or resolutions dealing with the same territory. In considering an annexation matter, the State Boundary Commission does not have unlimited discretion. The State Boundary Commission makes its decision on whether to approve a proposed annexation based upon its review of criteria set forth in section 9 of the State Boundary Commission Act; 1968 PA 191, § 9; MCLA 123.1009; MSA 5.2242(9). This annexation has been approved by the State Boundary Commission based upon existing statutory criteria and the decision of the State Boundary Commission has been reviewed by the courts of the State of Michigan and found to be supported by competent, material and substantial evidence on the record. *Avon Township* v *State Boundary Commission, supra,* 96 Mich App 736; 293 NW2d 691 (1980), *leave den.,* —— Mich —— (November 25, 1980).

Petitioners have failed to establish that they have a fundamental right to vote and, therefore, have failed to establish a denial of due process by any claimed interference with such right. There can be no violation of due process where Petitioners have failed to show that a protected right has been interferred with.

III.

SECTION 9 OF THE MICHIGAN HOME RULE CITIES ACT DOES NOT VIOLATE THE VOTING RIGHTS ACT OF 1965.

Petitioners contend that a provision of the Voting Rights Act of 1965, 42 USC § 1971(a) is not limited to racial standards but applies to any form of discrimination. To support this position, Petitioners rely principally upon *Frazier* v *Callicutt,* 383 F Supp 15 (ND Miss 1974). While the Court in *Frazier* stated that this statutory provision applied in nonracial as well as racial discrimination matters, the Court went on to note that the class being discriminated against, students, was made up of predominantly black individuals.

This Court has not previously determined whether the provisions of 42 USC § 1971 apply where the alleged discrimination is on some nonracial ground. However, in *Mobile* v *Bolden,* 456 US 55 (1980), this Court determined that the statutory language of 42 USC § 1973 which is very similar to the language contained in 42 USC § 1971(a)(1) prohibits only a purposeful discriminatory denial or abridgement by government of the freedom to vote on account of race, color, or previous condition of servitude.

Petitioners argue that 42 USC § 1971(a)(1) and 42 USC § 1971(a)(2) operate independently of each other. However, such an interpretation of 42 USC § 1971(a)(2) would render

42 USC § 1971(a)(1) meaningless, since any protection afforded by the latter provision would also be afforded by the former. The language of 42 USC § 1971(a) should be read in its entirety to determine the proper application of its provisions. Since Petitioners have failed to show any purposeful discrimination and have not alleged any discrimination on the basis of race, color, or previous condition of servitude, the provisions of 42 USC § 1971 are not applicable to the instant case.

Even if the provisions of 42 USC 1971 were held applicable to cases alleging nonracial discrimination, it is clear that the language of this provision is meant to protect the rights of an individual to vote in an election which is actually to be held. No provision of this statute requires a state or any territorial subdivision of a state to hold an election which is not otherwise provided for by law. In the case at hand, there is no election on the question on which Petitioners wish to vote; and no election is required to be called as the cases amply demonstrate.

The California Supreme Court considered an argument similar to that being advanced by Petitioners in *Weber* v *City Council of Thousand Oaks, supra,* and found that existing voting rights cases were distinguishable on the ground that it was necessary to show that an identifiable class of electors was being excluded from an election. In reaching this decision the Court stated as follows:

> ". . . *In the instant case no issue of the exclusion of a class from participation in an election is raised;* the issue instead is whether the inclusion or exclusion of any election as part of an annexation proceeding can justifiably be made to depend on the number of resident registered voters." *Weber, supra,* 513 P2d at 607. [Emphasis supplied.]

This is not a case in which an existing right to vote has been impaired or otherwise violated. Rather, it is an attemppt by the Petitioners to indirectly challenge the authority of the State Boundary Commission to approve annexations in the State of Michigan. The individual members of the State Boundary Commission have statutory guidelines to follow in considering all annexation matters; and as noted by the District Court, the proper forum to complain that the State Boundary Commission is not statutorily performing its function is in the state courts. (Opinion of District Court, Appendix p. 6a.)

CONCLUSION

No violation of a right to vote has been shown and no substantial federal question has been presented by Petitioners in this case. Petitioners have not shown the existence of considerations pursuant to Supreme Court Rule 17 that would warrant review on Writ of Certiorari in this case. For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Milton I. Firestone
Assistant Attorney General

Christopher J. Dembowski
Assistant Attorney General

Attorneys for Respondents

Plaza One Bldg., Ste. 3
Municipal Affairs & Finance
401 S. Washington Square
Lansing, Michigan 48933
(517) 373-9100

Dated: January 9, 1981

APPENDIX

Excerpt from Motion to Dismiss or Affirm in
Township of Midland v *Michigan State Boundary Commission*,
435 US 1004 (1978)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1285

TOWNSHIP OF MIDLAND, a Municipal Corporation in Midland County, Michigan and ROBERT B. CHATTERTON,

Appellants,

v

MICHIGAN STATE BOUNDARY COMMISSION,

Appellee,

and

CITY OF MIDLAND, a Municipal Corporation,

Intervening Defendant-Appellee,

et al

MOTION TO DISMISS OR AFFIRM

B. The Proceedings Below

The State Boundary Commission, acting upon various resolutions adopted by city councils proposing annexations of territory, did approve annexations of territories to the City of Midland, the City of Brighton, and the City of Novi. In each case, less than 100 persons resided in the area proposed to be annexed. The respective townships commenced action in the Circuit Court for the County of Ingham attacking the proposed annexations and raising numerous questions relating to alleged violations of state law, the state constitution, and the instant federal constitutional question. The cases were consolidated during the appeal process. The Michigan Supreme

Court unanimously upheld the authority of the State Boundary Commission and found that the contentions of the townships pertaining to alleged violation of the Federal Constitution, state constitution, and state law were without merit. Specifically, the Michigan Supreme Court, after careful examination of federal case law, concluded that there had been no violation of the equal protection guarantees afforded by the Fourteenth Amendment to the United States Constitution and stated:

> "We are of the opinion that the challenged classification bears a substantial relation to the object of the legislation: providing a means appropriate to the resolution of disagreements concerning annexation of territory to a city." *Midland Township* v *Boundary Commission*, 401 Mich 641, 666-667; 259 NW2d 326, 338-339 (1977).

It is from that final decision of the Michigan Supreme Court that the Appellants have filed the instant appeal.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-832

CARL E. MILLER, et al., CYRIL M. PELICAN, et al., EARL BORDEN, et al., and AVON TOWNSHIP

Petitioners

vs.

DAVID CALHOUN, et al., Members of the STATE BOUNDARY COMMISSION, and JAMES S. HYDE

Respondents

and

CITY OF ROCHESTER, MICHIGAN,

Respondent

BRIEF OF RESPONDENT CITY OF ROCHESTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS C. ANDREWS, JR.
610 Ann Arbor Trust Building
Ann Arbor, Michigan 48104
(313) 662-7214
Counsel for Respondent City
of Rochester, Michigan

December 15, 1980

THE INLAND PRESS, DETROIT, MICHIGAN

QUESTIONS PRESENTED

For the purposes of clarity, Respondent City of Rochester restates the questions presented as follows:

1. Does an annexation pursuant to a State law which permits annexation of unincorporated township territory to a city without a referendum vote where one hundred or fewer persons reside in the territory to be annexed, but which permits such a vote if more than one hundred persons reside in the annexed territory, either facially or as construed by Michigan courts and as administered by the Respondent State Boundary Commission, violate the rights of residents of the territory to be annexed or of the persons residing elsewhere in the Township.

   A. Under the due process clause or equal protection clause of the Fourteenth Amendment to the United States Constitution?

or

   B. Under the Voting Rights Act of 1965 (42 USC 1971)?

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CARL E. MILLER, et al., CYRIL M. PELICAN, et al., EARL BORDEN, et al., and AVON TOWNSHIP

Petitioners

vs.

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Respondents

and

CITY OF ROCHESTER, MICHIGAN,

Respondent

BRIEF OF RESPONDENT CITY OF ROCHESTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent City of Rochester, Michigan, respectfully shows why the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied in the above entitled cause.

STATEMENT OF THE CASE

The reference to the stay of annexation contained on page 4 of Petitioners' Brief should be expanded by showing that the stay referred to was one granted by the Michigan Court of Appeals in December, 1978, of the Order of Circuit Judge Jack W. Warren, Ingham County Circuit Court, dated November 29, 1978, affirming the Order of the State Boundary Commission and fixing an effective date of the annexation which is the

subject matter of that cause and the present cause. The Stay Order was dissolved by decision and Order of the Michigan Court of Appeals dated April 21, 1980, entitled *Avon Township vs. State Boundary Commission*, 96 Mich App 736. Application by the Township of Avon to the Michigan Supreme Court for leave to appeal was denied by Order dated November 25, 1980, and the annexation became effective at that time. The decision of the Michigan Courts was that the case of *Midland Township vs. State Boundary Commission*, 401 Mich 641 (1977), App Dism. 435 U S 1004 (1978), was controlling and that the annexation complained of was valid in all respects. With this exception the statement of the case contained in Petitioners' Brief sufficiently describes the litigation in the Federal Courts.

ARGUMENT

The reasons submitted by Petitioners at pages 6 through 16 of their Brief do not satisfy the considerations governing review on certiorari as set forth in Supreme Court Rule 19.

I

REGARDLESS OF WHETHER THE DISMISSAL OF THE APPEAL IN *MIDLAND TOWNSHIP vs. STATE BOUNDARY COMMISSION* (cited page 6, Petitioners' Brief), IS A BINDING PRECEDENT AS TO THE PRESENT CASE, THE DECISION CERTAINLY SUPPORTS THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS.

Both the District Court and the Circuit Court of Appeals cited other precedents clearly of a binding nature and Petitioners cite no case in support of their claims which conflict with these precedents.

Regardless of whether a Federal question was properly and timely raised in *Midland*, there can be no doubt that there was in fact no substantial Federal question raised in that case. The Michigan Court of Appeals found that the present case was controlled by the *Midland* decision (*Avon Township vs. State*

Boundary Commission, 96 Mich App 736 (1980), Lv den, ____ Mich ____, November 25, 1980).

One reason for the lack of a *substantial* Federal question in *Midland* as in this case is that there are numerous authoritative precedents deciding that there is no Federal Constitutional right to an election on a municipal boundary change. The controlling case is *Hunter vs. Pittsburgh*, 207 US 161, 28 S Ct 40, 52 L. Ed 151 (1907). The Petitioners cite a number of cases that they claim have impaired the authority of *Hunter;* but all of these cases have been examined by the courts previously with respect to their effect on *Hunter*, and it is the consensus of judicial decision that there has been no impairment of *Hunter* with respect to the procedures adopted by states in establishing a method for annexing territory to cities.

The vitality of *Hunter vs. City of Pittsburgh* was reaffirmed as recently as 1967 in the Sixth Circuit Court of Appeals in the case of *Detroit Edison Company vs. East China Township School District No. 3*, 378 F 2nd 225, cert den. 389 US 932 (1967).

Cases from other Circuits to the same effect include *Hammonds vs. City of Corpus Christi*, 343 F 2nd 162, Fifth Circuit, cert den. 382 US 837 (1965), and *International Harvester Company vs. Kansas City*, 308 F 2nd 35 (Tenth Circuit, 1962), cert den. 371 US 948 (1963).

The case of *Weber vs. Thousand Oaks City Council*, 9 Cal 3rd 950; 109 Cal Rptr 553; 513 P 2d 601 (1973), was relied upon by the District Court and the Circuit Court of Appeals because it is not only very similar in nature to the present case but in addition it reviews the voting rights cases relied upon by the Petitioners, and finds them inapplicable.

In addition to the *Weber* case the case of *Thompson vs. Whitley*, 344 F Supp 480, E.D. N.C. (1972), stands for the proposition that an annexation statute which permitted municipalities in certain counties to annex without a vote of the territory to be annexed if the annexing municipality was under 5,000 popula-

tion while denying the same privilege to municipalities of the same size in other counties except by a favorable vote of the area to be annexed, was not unlawful.

The Petitioners disagree with the results in these cases but are unable to cite any case in which a contrary result was reached.

The case of *Holt Civic Club vs. City of Tuscaloosa*, 439 US 60 (1978), is cited by the Petitioners at page 18 of their Brief. They claim that had the facts in that case been different that the result would have been different (Petitioners' Brief page 11). Petitioners may be correct in their allegation, but this is certainly too speculative to constitute any support for their position. In the *Holt* case a statute conferred police jurisdiction around Tuscaloosa's corporate limits for a distance of three miles on the City. This made residents of the Holt area subject to the City's "police and sanitary regulations" and to the City's power to license businesses, trades and professions. The challenge by the plaintiff was that the exercise of the police power over the Holt residents without extension of the voting franchise on an equal footing with City residents denied the plaintiffs rights under the due process and equal protection clauses of the Fourteenth Amendment. The Court held that the challenged statute did not violate the Constitutional provisions since appellants had no right to vote in Tuscaloosa elections. Respondent would argue that even if the *Holt* case had been decided adversely to the City, that the case would not constitute a precedent contrary to Respondent's position or support the Petitioners. The Court said that in this particular case there was a good reason for making nonresidents subject to limited jurisdiction of the City without conferring the right to vote on such nonresidents. The *Holt* case does not affect annexation cases. The persons included within the area to be annexed to the City of Rochester are now, and have been since November 25, 1980, full fledged citizens of the City of Rochester with all

the same rights and privileges as any other citizen, including all voting rights.

II
THE VOTING RIGHTS ACT IS NOT VIOLATED.

Petitioners claim that the Voting Rights Act is not limited to racial standards (page 15, Petitioners' Brief) and that neither the District Court nor the Circuit Court of Appeals considered the effect of that Act on this case.

Whether the Voting Rights Act applies to all forms of discrimination is not an issue in this case. What is an issue is whether that Act has any application *where no election is held or is required to be held* under any law or Constitutional provision. The answer is clear: The Voting Rights Act applies only when a determination is being made as to "whether any individual is qualified under State law or laws *to vote in any election* * * * " (Voting Rights Act of 1965, 42 USC § 1971(2) (page 3, Petitioners' Brief).

The Voting Rights Act does not speak to the need to have an election on a municipal boundary change; even if, under different facts, in another boundary change, proposed in a different area, an election could be sought and obtained.

The Petitioners' contention that the District Court and the Sixth Circuit Court of Appeals did not consider the claimed violation of the Voting Rights Act seems to be founded on their disappointment that these Courts were totally unimpressed with Petitioners' argument — not that the claim was not considered.

In fact the District Court dismissed the Petitioners' contention with the following language:

> "Underlying a contorted effort to make a voting rights case out of an annexation case is a complaint that the Michigan State Boundary Commission is not doing its job properly." (A 6a)

The Circuit Court of Appeals recognized Petitioners' claim

had been made but, since Petitioners did not, in either Court support their claim with any citation of authority or credible argument, there was really nothing for the Court to discuss in a formal Opinion.

CONCLUSION

There are no considerations calling for a review of this case on certiorari under Rule 19 or otherwise, and the Petition should therefore be denied.

Respectfully submitted

LOUIS C. ANDREWS, JR.
Attorney for Respondent City of
Rochester, Michigan
610 Ann Arbor Trust Building
Ann Arbor, Michigan 48104
(313) 662-7214

December 15, 1980